IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1054 of 1998

in

SPECIAL CIVIL APPLICATIONNo 5106 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.THAKKER and
MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VASANT C SOLANKI

Versus

JOINT MANAGER

Appearance:

MS DEVYANI N DAVE for Appellant

NOTICE SERVED for Respondent No. 1, 3

MS MAMTA R VYAS for Respondent No. 2

CORAM : MR.JUSTICE C.K.THAKKER and
MR.JUSTICE C.K.BUCH

Date of decision: 18/06/1999

ORAL JUDGEMENT

Admitted. Ms. Mamta Vyas appears and waives service of notice of admission on behalf of respondent Nos.1 and 2 and Mr. Anant Dave appears and waives service of notice of admission on behalf of respondent No.3. In the facts and circumstances of the case, the matter is taken up for final hearing.

This appeal is filed against the judgment and order passed by the learned Single Judge in Special Civil Application No. 5106 of 1996 on July 16,1998.

The appellant was as Assistant Teacher appointed in J.M.Desai High school at Thasra, District,Kheda. He was a music teacher. It appears that some proceedings were initiated against him and he was placed under suspension. It was the case of the management that a departmental inquiry was instituted against the appellant wherein he was found guilty. On 13.12,1993, it was decided by the management that since the teacher had committed serious misconduct and was found guilty, he should be dismissed from service. A notice to this effect was issued to the teacher, Administrative Officer ('AO' for short) was also intimated vide a communication dated 30.12.1993 as contemplated by Section 40B of the Bombay Primary Education Act, 1947 ('hereinafter referred to as "the Act'). On 12.1.1994, a letter was addressed to the AO stating therein that a resolution was passed by the management and the teacher was dismissed from service. A prayer was ,therefore, made to AO to give necessary approval under section 40B of the Act.

It was the case of the management that inspite of the above communication, no action was taken by the AO, either approving or disapproving the proposal sent by the management. Hence, various reminders were sent. On 16.12.1994, final order was passed which was communicated to the teacher as well as the AO in which it was stated that the teacher was dismissed from service. Only thereafter on 5.1.1995, the AO sent a letter of disapproval. It was,therefore, contended by the teacher that since proposal submitted by the management was disapproved by the AO, it could not have any effect and he is deemed to be continued in service. On the other hand, it is the stand of the management that as there was failure by the AO on the proposal submitted by the management and the statutory period of 45 days was over, the proposed action was "deemed" to be approved by him.

Since the teacher was dismissed from service and was not permitted to attend the school , as according to the management, he was dismissed and it was a case of deemed approval under Section 40B of the Act, the teacher approached the Gujarat Primary Education Tribunal by filing Application No. 40 of 1995. The Tribunal vide its judgment and order dated July 3, 1996, allowed the application on two grounds viz. (i) there was no deemed approval as contemplated by Section 40B of the Act and (ii) on merits, it cannot be said that the charges levelled against the teacher were established. The action of dismissal was , therefore, not legal. According to the Tribunal, the charges could not be said to have been established. An order was, therefore, passed directing the management to reinstate the teacher in service with full wages and other consequential benefits. The said order was challenged by the management by filing the above petition.

When the petition came up for hearing before the learned Single Judge, after hearing the parties, the learned Single Judge allowed the petition by passing the order impugned in the LPA. Paras 4,5 and 6 read as under:

"I have considered the rival contentions. There is sufficient material on record to show that the petitioner institution asked respondent No.2 DEO by letter dated 13.12.1993 to grant the approval for termination of respondent No.1. The petitioner has produced the said letter as well as acknowledgment receipt. This fact has also been established by oral evidence. Reminders were sent to respondent No.2 on 12.1.1994, 266.5.1994 and lastly on 7.12.1994. The DEO did not choose to reply to the petitioner. Thus, the petitioner having waited for long and considering there was a deemed approval, passed order of termination. It is only after the order of termination was passed, on 5.1.1995 the DEO sent a letter refusing approval. Sub-clause (b) of clause (1) of section 40B casts a duty on the Administrative officer to communicate to the manager of the school in writing his approval or disapproval of action proposed, within a period of forty five days from the date of receipt by the Administrative Officer of such proposal. Sub-clause (2) provides a deeming clause wherein it is stated that if the Administrative Officer fails to communicate either approval or disapproval within a period of forty five days

specified in clause (b) of sub-section (1), the proposed action shall be deemed to have been approved by the Administrative officer on the date of expiry of the said period.

In view of the overwhelming evidence that the letter for approval was sent on 13.12.1993, the Tribunal had committed a manifest error in not considering that there was deemed approval.

In view of the aforesaid, this Special Civil Application is allowed and the order of the Tribunal dated 3.7.1996 directing to reinstate the petitioner is quashed and set aside. Rule is made absolute. No order as to costs."

Two contentions were raised by Ms. Dave ,learned counsel for the appellant at the time of hearing of this appeal:

(i) The learned Single Judge has committed an error of law in holding that there was deemed approval under Section 40B of the Act and that the Tribunal was in error in not treating the teacher as having been dismissed from service. It was submitted that the Tribunal was right in holding that it was not a case of deemed approval and dismissal was not effective.

(ii) Even if it is assumed for the sake of argument that the learned Single Judge was right in holding that there was an error of law on the part of the Tribunal and that the case was covered by Section 40B of the Act and it was a case of deemed approval, the learned Single Judge ought to have decided the case on merits when the Tribunal has set aside the order of dismissal on merits.

Ms. Mamta Vyas,learned counsel for the management, on the other hand, supported the order of the learned Single Judge. She submitted that the learned Single Judge ,on the basis of documentary evidence on record, has reached a finding that it was a case of deemed approval and the action of the management was legal and lawful.

Now,clause (a) of sub-section (1) of Section 40B of the Act enacts that no teacher of a recognised primary school shall be dismissed from service unless he has been given a reasonable opportunity of being heard and the " action proposed to be taken in regard to him has been approved in writing by the Administrative Officer of the School Board in the jurisdiction of which the school is situate". Clause (b) of Sub-Section (1) declares that AO

shall communicate to the Manager of the school in writing his approval or disapproval of the action proposed within a period of 45 days from the date of receipt such proposal by him.

Sub-Section (2) is material and it may be reproduced :

> "(2) Where the administrative officer fails to communicate either approval or disapproval within a period of forty five days specified in clause (b) of sub-section (1) , the proposed action shall be deemed to have been approved by the administrative officer on the date of the expiry of the said period."

Thus, under the scheme of the Act, whenever an action of dismissal is taken by the management, it is obligatory on the part of the management to extend an opportunity of showing cause against the action proposed against the teacher and such action must be approved in writing by AO. For that purpose, a provision is also made in the Act that AO shall be communicated by the management of the school in writing about the proposed action and Section 40B of the Act enjoins AO to approve or disapprove such action within a period of 45 days from the date of receipt of such proposed action. Sub-section (2) provides that if AO fails to communicate either approval or disapproval within a period of 45 days specified in clause (b) of sub-section (1) of Section 40B, the proposed action shall be deemed to have been approved by the AO.

Looking to the dates mentioned by the learned counsel for the management and considered by the learned Single Judge, it is clear that a resolution was passed by the management dismissing the teacher from service. Even prior to that, proposal was sent to the AO. After resolution was passed on 9.1.1994, it was sent to AO on 12.1.1994 but no action was taken by him. Various reminders were also sent to AO but he failed to take any action . The learned Single Judge, in these circumstances, held and in our opinion rightly, that the deeming provision operated and it cannot be said that by holding so, the learned Single Judge has committed an error of law and/or of jurisdiction which deserves interference. To that extent,therefore, we do not see substance in the contention raised on behalf of the appellant. The said contention , therefore, must be negatived.

But there is substance in the second question raised by

the learned advocate for the appellant . It was submitted that the Tribunal has decided the matter on merits also in favour of the teacher and the Tribunal held that the order could not have been passed by the management in the facts and circumstances of the case. No doubt, Ms. Mamta Vyas for the management attempted to support the order passed by the management on merits by submitting that the action of the management was legal and proper. But as the learned Single Judge has not decided the matter on merits, in our opinion, it would not be proper for us to express any opinion one way or the other. It would be appropriate if the learned Single Judge in whom the jurisdiction is vested against the order passed by the Tribunal, to consider the question and to come to his own conclusion . Since that matter is not dealt with on merits by the learned Single Judge, to that extent, the appeal deserves to be allowed.

In the result, the appeal is partly allowed. So far as deemed approval is concerned, the learned Single Judge , in our opinion, was right in holding that deeming provision operated and the order of dismissal passed by the management could be deemed to have been approved by AO. The order, therefore, operated, as held by the learned Single Judge.

But on merits, since there is no finding and no discussion in the judgment of the learned Single Judge, the appeal is allowed and the matter is remanded to the learned Single Judge to decide the same in accordance with law.

We may state that as the learned Single Judge has not expressed any opinion on the merits of the matter, we also refrain from making any observation one way or the other since it may affect either party at the time of final disposal of the petition.

As the respondent teacher is out of employment and the main matter i.e. Special Civil Application No. 5106 of 1996 is old, we grant liberty to the learned counsel for the teacher to request the learned Single Judge for expeditious disposal of the matter. The learned Single Judge will consider the same and will take appropriate action. All questions and contentions are kept open.
The appeal is accordingly allowed to the aforesaid extent. No order as to costs. No order on civil application.

parekh